No. 1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BENJAMIN RITHOLZ

Petitioner,

vs.

RICHARD B. OGILVIE, Sheriff of Cook County, Illinois, successor in office to Frank G. Sain,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

I.

Respondents claim (Br. 1-2) that Petition for Certiorari herein presents no Federal question of substance.

In our Petition (pp. 2-3) we cited Article IV, Section 2, Clause 2 of the Constitution of the United States, Title 18, United States Code, Section 3182 and a number of Federal cases.

This is an Extradition case and governed by the Federal Constitution, Art. IV, Sec. 2, Clause 2, and 18 U.S.C. 3182 and thus a Federal Case *ipso-facto*.

In addition, in Petitioner's verified Traverse to Respondent's return, in the Criminal Court of Cook County, Petitioner did raise the Federal Due Process question under the XIV Amendment to the Constitution of the United States. (Tr. 105-128; Appellant's Brief in Sup. Ct. of Ill. p. 5)

II.

Counsel argues (Br. 2-3) that "Even assuming however, that a Federal question has been raised * * * the doctrine of *res judicata* does not foreclose a second attempt at extradition where the relator was discharged from the first proceeding for a *technical* fault in the papers" and cites *Collins* v. *Loisel*, 262 U.S. 426, 430; 39 C.J.S. Habeas Corpus 104; 22 Am. J. Extradition 57, and 102 A.L.R. 303.

The discharge of relator in the first extradition case, however, was *not* for a *technical* fault:

> nor do we believe that the contradiction is a mere technicality.—*People ex rel Ritholz* v. *Sain*, 24 Ill. 2d 168, at 174.

In *Collins* v. *Loisel*, 262 U.S. 426, *res judicata* was held inapplicable because the first discharge was predicated upon the failure of respondent to permit relator to proceed with the presentation of evidence, as was required under Louisiana law, and therefore the first extradition attempt was held to have been abandoned, a situation similar to a voluntary dismissal which does not prohibit a further suit upon the cause of action. Furthermore, it was held that *under treaty* with Great Britain a fugitive "may be arrested in extradition proceedings a second time upon a new Complaint charging the same crime * * *" (262 U.S. 426, 429) thus outlawing the principle of *res judicata*.

39 C.J.S. Habeas Corpus §104b, pp. 695-696, states:

> An order of discharge other than for *technical* or *curable* defects terminates the pending proceeding so that the person discharged cannot be further restrained thereunder.

The Supreme Court of Illinois, 24 Ill. 2d 168 in affirming the discharge of relator in the first proceeding held that the contradiction was neither *curable* (p. 175) "nor do we believe that the contradiction is a mere technicality." (p. 174)

In 35 C.J.S. §18 Extradition p. 347, it is said:

> If an alleged fugitive has been discharged from arrest through Habeas Corpus proceedings, after a trial on the merits, he may, if re-arrested for extradition for the same offense, plead *res judicata* • • •.

The citations given by Counsel (Br. 2-3) amount to this:

> If the first discharge is for a *mere matter of form* or *technical defect* a second proceeding may be had; otherwise a second proceeding will be barred by the principle of *res judicata*.

As previously shown the first discharge here was not for a *curable* or *technical defect*, but after a trial on the merits, and the second proceeding was therefore barred by the principle of *res judicata*.

III.

A discharge in extradition is *res judicata* not only of the issues raised therein but also of all issues that 1) could have been or should have been raised, 2) were necessarily involved or 3) were in *existence* and *known* to the prosecution.

On pp. 3-27 of our Petition for Certiorari we pointed out by reference to the Record that the fact of "bail jumping" was in existence and known to the prosecution during the first as well as second proceedings and that the facts of bail jumping were *identical* in both cases; and that respondent had *accepted* relator's delineation of facts (Pet. for Certiorari p. 7; pp. 12 and 13)

Among cases cited by us in support of this well known doctrine we cited among others, this Court's decisions in *Angel* v. *Bullington*, 330 U.S. 183, 192-193 and *Heiser* v. *Woodruff*, 327 U.S. 726, 735 (Pet. for Cert. p. 18) as well as other Federal cases.

Since the filing of our Petition for Certiorari, there has come to our attention the very recent case of *Raymond Downum* v. *U. S.*, 31 LW 4369, decided by this Court on Apr. 22, 1963, a case involving *double jeopardy*, where as in the case at bar:

> The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. 31 LW 4369, at 4370
>
> "We resolve any doubt" in favor of the liberty of the citizen rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion. *supra*, pp. 4370-4371

Respectfully submitted,

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